

Characteristic violence in sport governed by criminal law (II)¹

by Sergio Garcia Ramirez

4. Exceptions to incrimination

Before beginning to examine the causes excluding incrimination in cases of injuries and other typically sporting occurrences, attention should be called, even if only briefly, to the solution given to this problem by the idea—inadequate in our opinion—of the “sports offence”.

Obviously Roman Law and its commentators have already examined the subject of injuries and homicide in sport, solving the question with the “casuistic criterion”²⁴, but it was not until quite recently that the idea of the “sports offence” was proposed as an autonomous formula for inclusion in penal codes, incurring only a slight penalty compared with that incurred in cases of injuries and homicide in common law.

This lenient treatment of the cases mentioned is easily accounted for by the special circumstances under which the events involved occur. The tendency in favour of the solution we are examining has received very limited acceptance in positive texts: it has been accepted, in fact, in Articles 438 and 449 of the Ecuadorian Penal Code and in Article 449 of the Cuban Code of Social Defence²⁵.



Violence in the stadia.

In this connection, we are of the opinion expressed by certain authors, who point out that, as already mentioned, a “sports

²⁴ The commentator Gometius de Amescua tried to lay the foundations of a general principle in his “Tractatus de protestate in se ipsum” (1604): Homicide in sport is not punishable, by virtue of the custom which accepts it. Regarding this as well as the historical solutions to the penal question of sport, and the origin and evolution of the latter, see Jiménez de Asua, Treatise on Criminal Law, op. cit. Vol. IV, p. 727 onwards; and Majada Planelles, The Penal Problem of Death and Injuries in Sport, op. cit., p. 7 onwards.

²⁵ Article 438 of the Penal Code of Ecuador is worded as follows: “Homicide committed by a sportsman in the course of a game with regard to another sportsman playing with him shall not be penalised, if it can be clearly shown that there was neither deliberate intent nor infringement of the relevant regulations; and provided it is a sport not prohibited by the Republic. In

all other cases reference will have to be made to the general rules on homicide in this chapter.” Article 449 of the same decree says “in fine”: “In the circumstances covered by Article 438, when it is a question of wounds or injuries, reference must be made to what is therein laid down”. Article 449 of the Cuban Code says: “A) Anyone who, taking advantage of the opportunity to take part in an authorised sport, deliberately and in violation of the rules of the game, causes an injury to a third party, shall be responsible for the damage resulting therefrom and shall incur the penalties laid down for each case in the previous articles. B) If the injury is not deliberate but results from a breach of the rules of the game, committed in the excitement and the enthusiasm of the game, the person responsible shall be punished as for a fault, in accordance with the rules of Article 72. C) If the injury caused was not deliberate on the part of the person inflicting it, and provided he has committed no breach of the rules of the game, said

¹ See “Olympic Review” No. 99-100.

offence" is nothing more than a concrete application of the principles governing fraud, error and fortuitous event, or accident. That is why it is unnecessary to include this special formula in the penal code if the cases under study can be settled, quite simply, by the normal provisions contained in the general section on culpability²⁶.

a) *The problem of blamelessness*

If we wanted or had to restrict ourselves in this work to the logical order of priority existing between the various aspects or positive elements of the offence and its corresponding negative elements²⁷, we should naturally consider first of all the problem of legality, and only later deal with the question of culpability. However, we prefer to start with the second of these two questions, as it is the easier to grasp and much clearer regarding violence in sport, and go on afterwards into the question of legality, a source of much dispute where the most varied opinions are to be met with.

Consequently, we do not think that freedom from guilt in the case of a fortuitous event

(which is the extenuating circumstance we are dealing with in this paragraph) offers complete impunity for all violence in sport, indiscriminately²⁸. In fact, for this freedom from guilt to apply, for the "saving clause" to become effective, that is to say for the unforeseen, for chance to be operative, one has to disregard all cases of violence, which, far from being unintentional, are perfectly deliberate and in fact required by the rules of the game, and in which, in view of the more or less likely risk of injury, measures are taken to ensure that this injury is less serious or, in some sports even, that it should never occur²⁹.

It is time now to go back to the classification of sports that we suggested above, for this will help us to distinguish between the cases involving a fortuitous event, which implies freedom from guilt, from those in which a justifying event is operative, signifying legality.

In sports which do not automatically include the possibility of events coming under Criminal Law, in which there is no direct confrontation between the athletes

person causing the injury shall not incur any criminal liability. D) If the injury caused was done with the consent of the referee, umpire, linesman, etc., the latter shall be considered an accomplice in case A), and a co-author in case B)."

²⁶This is the point of view of Jiménez de Asua, who shares the opinion expressed by Constanancio Bernardo de Quiros and agrees with the criterion of Evelio Tabio. It was Girolamo Penso who proposed the definition of a "sports offence" as "a physical injury caused deliberately or directly because of and in the exercise of a violent sport (in which the injury is the natural, necessary outcome) by means of authorised movements": see Jiménez de Asua, *Treatise on Criminal Law*, op. cit. Vol. IV, p. 729; and Majada Planelles, *The Penal Problem of Death and Injuries in Sport*, op. cit. p. 76.

²⁷Obviously the statement of the terms or stages of this order depends on the thesis applied to the elements of the offence. For the heptatomic current, the progression is in this order: behaviour or act, specificity, anti-juridicity, imputability, guiltlessness, objective conditions of punishability (on the negative side, the respective excluding factors would have to be placed in the same order). Celestino Porte Petit points out in this connection: "For an offence to be committed, there needs to be the existence of certain elements, with a certain logical order between them. Thus, for an offence to exist, there must have been a behaviour or an act or, depending on the terms used, a simple act or behaviour. This behaviour or this act must be typical, then anti-juridical, and so on until complete exhaustion of the elements of the offence. However, for there to be specificity, the existence of the beha-

viour or the act must be compulsory; for there to be anti-juridicity, there must be specificity; and there would be no point in speaking of culpability, if the behaviour or act were not specific and anti-juridical. Consequently, our point of view is that the elements of the offence must be in a logical order... in view of the fact that no one can deny that, for an element of offence to occur, the contravener must precede this with regard to the very nature of the offence". Notes from the General Section of Criminal Law. Mexico, D.F.1, p. 148, see p. 149-151.

²⁸On the other hand, Eugenio Cuello Calon who, referring to Article 8, 8a of the Spanish Penal Code (on the fortuitous event), says: "This precept frees from penalty anyone who, in the course of games or sports (football, rugby, boxing, etc.) causes death or injuries; but for exemption from liability to be granted he must have acted with the necessary prudence and care, which is possible only when the rules of the game or sport have been complied with, and when these are lawful". Disagreeing with Quintano Ripolles, he stresses the likening of a sports injury to a fortuitous event "when the following required conditions are satisfied: a) that the sport and its rules are authorised or permitted by the competent authority (legality of the act); b) that the said rules have been observed in the sports act (practice of sport with the necessary care)". *Criminal Law*. Ed. National. 9th edition, Mexico, 1961, p. 466-467, esp. No. 31, p. 467.

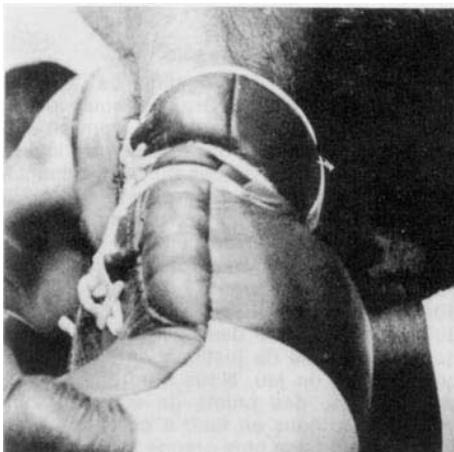
²⁹For example, let us take into account the fact that in football no player may wear articles (jewels, pins, bracelets or other metal objects) that might cause injuries during play (Rule V).

the possibility of an athlete being killed, injured or only slightly hurt will be very slight, even though such events may occur. In other sports which involve direct opposition or confrontation between the participants but which do not require violent aggression, the possibility of injury or death becomes more likely than in the previous instance, but is nevertheless not part of the normal course of the game. In all these situations, therefore, the injury will be attributed to an accident, a fortuitous event, provided the player has complied with the rules governing the game³⁰.

To use the words of para X of Article 15 of our Penal Code, we shall say that "a purely accidental injury has been caused (there is a connection of causality between the act of the player and the harmful result), without any criminal intent or carelessness, in the performance of a permitted act with all the necessary precautions".

Obviously all this does not presuppose the blind application of the extenuating circumstance, the fortuitous event, in all cases of violence committed in the sports already mentioned. It is possible that the person who caused the injury acted deliberately, or at least with fault on his side, in which case one would expect the regulations governing offences involving criminal intent or culpability, depending on the case, to be applicable. For chance to apply, it should be stressed, there must be no hidden injurious intent in the act causing the injury, no predictability and no direct rivalry likely to result in the fault being committed.

Consequently chance is possible in violent sports requiring the performance of acts coming under Criminal Law, and this applies to the whole set of very



Acceptance of the risk.

serious injuries inflicted by opponents, in excess of what is permitted or tolerated by the practice of the sport in question³¹. Furthermore, these same sports naturally also include the possibility of fraud or fault on the part of opponents as well as the culpability (culpability will be more common than criminal intent) of third parties such as doctors, referees and seconds, who allow the meeting to take place knowing full well that one of the athletes cannot or should not participate, or at least say nothing, out of negligence and in the hope that in spite of the circumstances neither serious injuries nor death will ensue³².

From a practical point of view, it is important and in fact indispensable to clarify the position of someone claiming the benefit of a fortuitous act in relation to someone claiming the benefit of the exclusion granted by anti-juridicity. While the latter acts legally, the former, even though

³⁰ See Jiménez de Asua, *Treatise on Criminal Law*, op. cit., p. 733; González de la Vega, *Mexican Criminal Law*, op. cit., p. 30-31; Pavon Vasconcelos, *Notions of Mexican Criminal Law*, op. cit., Vol. II, p. 145-146; and Cardenas, *Mexican Criminal Law*, op. cit., p. 166. We do not agree with Villabos when he states that in sports involving acts coming under Criminal Law, "the resulting injuries or death are to be likened to a fortuitous event whenever those involved have acted in accordance with the requirements and limits laid down in the regulations, because the person causing the injuries or death acted within the exercise of the right given by the official authorisation". *Mexican Criminal Law*, op. cit., p. 350. Here we see a certain confusion between the fortuitous event (cause of the blamelessness) and the exercise of a right (cause of legality).

³¹ "Neither death nor wounds are implicit in the rules of the game (referring to boxing and rugby) and its normal course", says Jiménez de Asua. "If such events occur, they are not justified. In the event of their occurring accidentally and without infringement of the rules of the game, we are in the presence of the so-called fortuitous event which is a limiting factor on culpability and not a justifying motive". *The Law and Offences*, Ed. Hermes, 2nd edition, Buenos Aires, 1954, p. 334-335.

³² A doctor or a manager, who, through imprudence or carelessness, authorises the fight, ignoring the lack of experience or poor physical condition of one of the participants, incurs criminal liability. See Pavon Vasconcelos, *Notions of Mexican Criminal Law*, op. cit., Vol. II, p. 146.

he is not guilty, nevertheless acts unlawfully, hence he will be compelled—irrespective of the fact that his behaviour remains unpunished on the penal level—to repair the particular damage that his act has caused.

b) The problem of legality

The question of the legality of the juridical act or act coming under the Law arises with reference to the practice of those sports, so frequently mentioned, in which acts coming under Criminal Law are performed. With the exception already noted (see above, No. 28) of those who place the damage caused in the same category as the results of a fortuitous event, and of those who favour the existence of a non-specificity (see below 4, b, a), the overwhelming majority of opinion supports the justification of the behaviour. But there are others who consider that the cause of justification is the one applicable. We shall give a brief account of the current points of view, and then go into more detail concerning those which seem to us to be of greater importance.

a) Justificative theses

As we have already said, the criteria laid down by criminal doctrine regarding the justification of injuries and violence in sport in general differ greatly. We do not intend to go into all these points of view

which, moreover, are well known to experts in this field³³. On a level prior to the justification—prior from the logical, non-historical point of view—there is the thesis which tends to see in the facts with which we are now concerned a cause of non-specificity, rather than one of justification. In fact, some authorities consider that even if the behaviour might be classified as criminal, in actual fact it would not fit wholly into such a category, because the “socially acceptable action” (a concept which, let us say in passing, very strongly suggests justifying elements) is not specific³⁴. And others maintain that in sport an athlete does not strike, but “charges” or “punches”³⁵.

We believe that these theses are too artificial by far: on the one hand, whether socially acceptable or not, the behaviour is definitely felt by the subject; and, on the other hand, to say that in football or in rugby the players do not strike but charge or tackle, and that in boxing the boxers do not strike either but punch, is to play on words, or at least attempt to conceal their meaning by the use of synonyms. In the real sense of the word, boxing is nothing more than “fighting with one’s fists”, and what does this mean but “striking”? The connotation “striking” is inseparable from the English word *box*, which gave its name to the sport and is defined as “to strike with the hand, or fight with the fists”³⁶.

³³The doctrinary summary made by Jiménez de Asua is very complete and interesting, particularly in its listing of the following justifying motives: 1) lack of existence of punishable offence, through absence of subjective elements of the agent of injustice (Douai Court); 2) exceptional criminal juridical legality (Arturo Rocco); 3) custom (Karding, José Anton, Janitti, Maggiore, Delogu, Severino and Oscar Stevenson); 4) Professional Law (Battaglini, Quintano Ripollés); 5) Consent (Ramirez Silva, Demogue, writers and jurisprudence of England and the United States); 6) absence of anti-juridicity (Pedro Garraud and Orfeo Cecchi); 7) end recognised by the State (von Liszt); 8) conformity with cultural standards (Majada Planelles, Antolisei, Mahling, Shonke). See *Treatise on Criminal Law*, op. cit. Vol. IV, p. 733-735; see also, for a general presentation, Majada Planelles. *The Penal Problem of Death and Injuries in Sport*, op. cit., p. 47 onwards (with special emphasis on the analysis of the thesis of consent) and p. 115 onwards.

³⁴This is Bettiol’s thesis, which Paulo José da Costa Jr. criticises as follows: “Injuries in sport... are not atypical because they are socially acceptable. Or they are atypical because they do not conform to the type; or they do not constitute a crime, for they are justified by the relevant objective extenuating factor.” Considerations on

Supra-Legality in Criminal Law, in *Criminal Studies*, homage to R.P. Julian Pereda S.J. University of Deusto, Bilbao, 1965, p. 221.

³⁵Jiménez de Asua expressed himself along these lines, saying: “The characteristic factor is absent because it cannot be said of anyone who gives a permitted blow, in the course of a game, to his opponent, in football or rugby, and especially of anyone who punches his opponent in boxing, that he has committed the offence of wounding, because he does not “strike”; he “charges” or “boxes.” *The Law and Offences*, op. cit., p. 344. Along the same lines, see *Treatise on Criminal Law*, op. cit., Vol. IV, p. 737. It should be pointed out that the famous Spanish jurist resorts, although unwillingly, to the justification of the end recognised by the State (he says: “If we wanted to go more deeply into the question of anti-juridicity and justification, although this is not necessary when the characteristic factor does not exist...”). In addition, he has also written in the *Treatise on Criminal Law* (op. cit., Vol. IV, p. 738): “The blows of a boxer are blows, and even the jargon used approaches more closely to the legal specificity than in other cases and other sports. People talk in fact of punishing, hitting, etc...”

³⁶With regard to the significance of “box” and “blow” (“boxear” and “golpe”) see the *Dictionary of the Spanish Language*, published by the Real

Some people claim that custom is sufficient to justify normal violence in sport, a criterion that is insufficient, in so far as habit in no way excludes incrimination. Even if custom did sanction violence in sport, it could not serve as an excuse for failure to observe criminal law 37. It is different when force of custom causes people to tolerate or exonerate sporting acts which, if it were not for inertia and complaisance, would be liable to punishment³⁸.

Of even greater interest are the theses concerning the legality of the act, as a result of its complying with the norms of culture or of its beneficial ends recognised by the State, all criteria that, in essence, coincide, not only in asserting the juridical quality of the deed but also in using for the purpose supralegal or non-codified factors. We think that this doctrine could, in certain cases, solve the problems with which we are concerned, if factors excluding consent or the exercise of a right were not applicable. But, in view of their special interest, we shall be going into these excluding factors later on.

Academia Española. Villalobos criticises the thesis of non-specificity, see 'Mexican Criminal Law, op. cit., p. 348, No. 14. Pavon Vasconcelos does the same, when he maintains that the disputed argument "not only defies logic but is inconsistent, since boxing is characterised by the violence with which the two boxers hit each other, aiming their fists against the body of their opponent with the intention of hurting him. The result of such blows, injuries or homicide finds characteristic correlation in the regulations defining such offences (Articles 288 and 302)". Notions of Mexican Criminal Law, op. cit., Vol. II, p. 147.

³⁷ It is important to take into account what has been laid down in Article 10 of the Civil Code: "Against the observation of the law one cannot call on disuse, custom or contrary practice".

³⁸ Anton Oneca says on this matter: "If we restrict ourselves to the daily observed realities, we shall come across the usual elements giving a margin of tolerance for injuries caused by a breach of the rules of the game, and consequently, not accepted by the opponents and see that instead of the penalties deserved by such deliberate or culpable behaviour, they are the subject of only insignificant disciplinary action". Critical Notes on the Penal Code. Injuries, in *Criminal Studies...* op. cit., p. 782.

³⁹ In this connection, see the transcriptions of the criteria upheld by the Supreme Court of Justice, made by Cardenas in *Mexican Criminal Law...* op. Cit., p. 167-168.

⁴⁰ Anton Oneca makes use of various criteria, such as the end recognised by the State, the exercise of a right (invoking No. 11 of Article 8 of the

Sometimes, the solution given is uncertain. This has occurred with Mexican jurisprudence which has referred simultaneously to an "end" recognised by the State and the existence of a fortuitous act³⁹; the latter being insufficient to explain the impunity granted in cases of ordinary light injuries in wrestling and boxing, as wrongly claimed. Finally, there are many hybrid opinions which use different criteria at the same time in order to justify injuries⁴⁰.

b) The function of consent

We have already indicated that certain authors consider the consent of the injured party⁴¹ sufficient to legitimate violence in sport, based on "volenti non fit injuria". It is a matter here of express acceptance or tacit consent. On the other hand, other authors disagree entirely with this postulate⁴².

This point requires more thought, taking into consideration not only doctrinal differences, but also the obscurity reigning in the actual field of justificative consent. We must ask ourselves again therefore, with a view to finding a rapid, concise answer: is it always possible for consent

Spanish Penal Code) and consent. In referring to the exercise of a right, he indicates: "However, obviously a justifying factor that is so vague—a criticism sometimes levelled against this extenuating factor—must be concretised by the acceptance of the risk of suffering injuries, subject always to observance of the rules of the game, implicit in the exercise of these dangerous activities". Critical Notes on the Penal Code, op. cit., p. 792. We have already seen, in note 38, how this author calls attention to the working of the factor of custom.

⁴¹ There is no agreement as to the exact name of this postulate, frequently referred to as "consent of the injured party". Raul Goldstein indicates that "from the penal point of view, the injured party can be called the passive subject of the offence". Dictionary of Criminal Law. Ed. Bibliografica Omeba, Buenos Aires, 1962. Carnelutti speaks of the consent of the interested party. See Punitive System. J.A. Roux expressly points out its inapplicability to death, injuries, and blows occurring in boxing. See Course of Civil Procedural Law, Translation by Niceto Alcalá-Zamora y Castillo and Santiago Sentis Melendo. UTEHA, Argentina, Buenos Aires, 1944, Vol. I, p. 32. Porte Petit refers to the consent of the interested party, see Programme of the General Part of Criminal Law, UNAM 1st edition, Mexico, 1958, p. 383. None of these Proposals really satisfies us but it is not the moment to try—and justify—a new name for this subject.

⁴² The maxim "Volenti non fit injuria", as a proposal of general approach has lost all its prestige in the field of law, see "Criminal Law and Criminal Procedure". Librairie de la Société du Recueil Sirey, Paris, 1920, p. 148.

to justify harmful or dangerous actions? And if not, in what cases would extenuating factors apply to violence in sport?

Let us point out here that consent sometimes excludes specificity and at other times anti-juridicity⁴³, and agree that for the latter to occur, it must be a question of disposable property for whoever consents to its loss and that, on the other hand, the expression and the circumstances inherent in the consent must satisfy certain legal requirements⁴⁴.

In the light of the above and at the same time making it clear that in no way do we wish to mix up the criminal and procedural problems that arise, it is possible to consider that the requirement of a charge⁴⁵ proceeding against the behaviour coming under criminal law provides an almost sure means of distinguishing cases of effective consent from their opposites⁴⁶.

On this basis, consent would succeed in excluding the illegality of blows and other ordinary physical violence referred to in Article 344 of the Penal Code; let us not forget that it is a question here of tacit consent, the best proof of which, for pragmatic purposes, is the lack of a charge. But consent would have no justifying force in the case, frequently occurring in the practice of sport, of blows given during a meeting or in a public place (Article 346 of the Penal Code).

⁴³It is not the question of anti-juridicity that is raised the most frequently but that of specificity, whenever—either expressly or understood—an action committed against the will of the passive subject is involved. See Mezger, Edmundo, *Treatise on Criminal Law*. Ed. Rivista de Derecho Privado, Madrid, 1955, Vol. I, p. 423.

⁴⁴For consent to be a valid extenuating circumstance, it is essential: 1) that the consent be given by the subject or those invested with the juridical interest, 2) that, in addition to being invested with the juridical interest these should also enjoy the right of exercise, 3) that the declaration of willingness should be made in the form laid down by law, 4) that the consent should not be prohibited by law, and 5) that said consent should not be immoral or contrary to public order. See Manzini, Vincenzo, *Treatise on Criminal Law*. Translation Santiago Sentis Melendo. EDIAR, Editores Buenos Aires 1948, Vol. 2, p. 32. On this last point, refer to paragraph 226 of the German Penal Code dated 26th May 1933, which stipulates: "Anyone inflicting a bodily injury with the consent of the injured party acts anti-juridically only if, in spite of the consent, the act offends normal custom".

⁴⁵As to Mexican Law, we speak of a charge in the sense in which it is understood in this law: as a simple request for proceedings and not as

This is not very important however. We wished only to give an account of the part played by consent in the case of blows, but it must not be made dependent on the legality of the latter, when they are incurred in sport. The same justification covering injuries could be used to justify all blows, indiscriminately, irrespective of the circumstances in which they have been given.

Consent offers greater interest in the matter of insults (Article 348 of the Penal Code), which are unfortunately only too common in sport. We can even go so far as to say that neither the exercise of a right nor an end recognised by the State justifies insulting behaviour, in view of the fact that insults never form part of the normal, regular course of any sport. Naturally, there are cases in which consent does not make insults lawful, but these suppositions need not concern us any longer owing to their improbability in practice⁴⁷.

We see therefore the function of consent reduced to a modest role, in the field under study; extra-legally, in fact, when insults are uttered in a sport or because of it, these insults cannot justify the causes of exclusion of anti-juridicity that we shall examine below.

S.G.R.

(to be continued)



in other legislations where it is understood as a private or particular criminal suit.

⁴⁶Manzini says that in the general sense: "All interests of whatever kind, protected by criminal law by means of incriminations involving offences punishable by charges... are left to the discretion of the holders of the interests." *Treatise on Criminal Law*, op. cit. Vol. 2, p. 26. In order to determine whether there is priority of public interest or private interest, use is made, in many cases, of the existence of the possibility of a charge. Cf. Mezger, *Treatise on Criminal Law*, op. cit., p. 428-429. But let us bear in mind that this is only a means and not an absolute rule. The same Mezger and Reichsgericht reject the application of this rule in cases of adultery. See op. cit. R. Gavier does likewise in his notes on "Derecho argentino al Tratado de Manzini." See op. cit.

⁴⁷The term improbable is better suited to the hypothesis described in para 1 of Article 360 of the Penal Code than to the conclusion of para 25 of the same article. The latter could be applied to contests or matches between individuals or between teams of different nationalities. Even so, one notes the requirement of provocation (a specific variant of the quarrel, a prerequisite for proceedings) when the insults are made "against a foreign country or government, or against its diplomatic agents in the country".